

## A FETISHISED GIFT

### The Legal Status of Flags

*Graeme Orr\**

Accounts of the relationship between flags and the law have focused on a narrow strain of contentions drawn from debates about political expression. This essay seeks to bridge the gap between cultural studies' insight into nationalism and its symbolics, and the flag's legal status, to better understand the unique position occupied by national flags. Flag 'waving' has become more prevalent in many liberal democracies. In such societies, flags occupy not a religious role, but a quiet and quotidian place in what Billig terms 'banal nationalism'. As a cipher for the whole, a particular flag's design is relatively unimportant; what lends it power is a mix of the gravity bestowed by its official designation and the easy commodification lent by a flag's easy reproducibility and portability. Unlike other state symbols such as the currency, coat of arms and honorifics, the state does not seek to monopolise the flag's use, let alone define its meaning. An analysis of the laws in several countries governing flag designation, observance and 'desecration' reveals that the law accords the flag distinct status yet only equivocal protection. While the state may crave its citizens' fealty, a flag is not a symbol of some distant governmentality. Rather, it is gifted to 'the people' and relies for its relevance on its organic proliferation. As both object and image, people attribute a power to the flag – a power they recognise over themselves and others with whom they share a body politic. A key source of this fetishisation is its official, legal designation. Though it embodies no particular values, a flag is valued, even fetishised, by flag-wavers and flag-burners alike.

### Introduction

This article begins with a reflection on the meaning and rhetoric of contemporary flag use, to put into context the rise in the use of flags in recent years. It goes on to explore the detail and meaning of the law giving status to national flags, with a focus on Australia, New Zealand and the United States. In doing so, it seeks to tease out what, if anything, acts of

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\* Associate Professor, Law School, University of Queensland. The author thanks Greg Dale for his (as ever) excellent research assistance and the three anonymous reviewers for their kind and helpful comments.

flag-waving and flag-destruction share, the extent to which both reveal a fetishism of flags and the law's relationship to that fetish.

The legal act of designating an official flag – unlike the law governing other national symbols and currencies – is intended to encourage its proliferation, rather than create a monopoly. A flag is not an official symbol in the sense of representing a formal, even distant, governmentality. A flag is inevitably a cipher, and hence a site for contested values. As a result, although the state desires to encourage honour and respect for the flag, and hence the state's symbolic self, the law is equivocal about punishing flag-destruction, let alone constraining flag use.

Ultimately, if the flag is to maintain its place as something gifted to a people, it relies for its relevance on its reproducibility and organic proliferation. It needs to be valued, indeed fetishised, by flag-wavers and flag-burners alike. Like most fetishes, flag fetishism bestows an arational power upon a common object. An otherwise empty, geodesic design on a piece of fabric is invested not just with the ability to symbolise, even bind, otherwise disparate people within a fractious liberal legal order: it comes to possess such emotional power that its mere sight inspires some to tears and others to jeers.

Thus, while this article considers the statutory and case law concerning flags, our concern is not with the flag's constitutional status in any formal sense, but its constitutive role and how the law intersects with this. Nor is our purpose to explore the meaning of the layout of any particular flag. As Kolstø observes, from the perspective of divided societies, there are 'no inherent qualities in state symbols that prevent them from being accepted [and] likewise, no particular design will ... guarantee their success'.<sup>1</sup> Australian republicans and supporters of Ausflag,<sup>2</sup> who for reasons of aesthetics and modernisation want to jettison the union jack and create a more vibrant colour scheme for their national flag, share the same project and assumptions about the flag's importance as the conservative Australian National Flag Association (ANFA).<sup>3</sup> Even if the flag were the boxing kangaroo, rather than the present mix of union jack, federation star and southern cross constellation, it would still appear on flagpoles and stickers, and be burnt at protests.<sup>4</sup>

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<sup>1</sup> Kolstø (2006), p 676.

<sup>2</sup> 'Ausflag is an apolitical, non-profit organisation seeking to secure the popular support of the Australian people for the adoption of a truly Australian flag': [www.ausflag.com.au/aboutus.asp](http://www.ausflag.com.au/aboutus.asp).

<sup>3</sup> ANFA's objectives include 'to communicate positively to all Australians the importance and significance of our chief national symbol' and 'to encourage personal identity with the Australian National Flag at all levels of the community': [www.flagaustralia.asn.au/aims.php](http://www.flagaustralia.asn.au/aims.php).

<sup>4</sup> On the Union Jack as an empty signifier, capable of recontextualisation, see Reichl (2004).

## Suburban Nationalism: Fad, Fealty and Fetish

At our local kindergarten recently, I noticed a new phenomenon. A fellow 'kindy dad' was lowering an Australian flag. Neatly folded, the flag was put away quietly, ready for the same gentleman to unfurl and hoist it the next morning. At this community kindergarten, each parent is rostered several times a year to act as a teacher-aide. Within weeks, it had become an expected – but not mandatory – part of roster duties to raise and lower the flag each day. The ritual was not part of the curriculum. Rather, it was fitted into the quiet, quotidian tasks, like laying out morning tea and cleaning tables. Some of the four-year-olds found the sight of the unfurling flag captivating; the majority, however, seemed blithe to the purpose of the exercise.<sup>5</sup>

Driving on, that same day, to the local primary school, I noticed a different phenomenon. In a four-wheel-drive vehicle sat a parent, also waiting for her offspring. Her car featured a brusque bumper sticker. On it was emblazoned the Australian flag, and in bold capitals the legend: 'Support it. Or F\*#k off'. It was an aggressive variant of a more common sticker also featuring the flag: 'Love it or leave it'.<sup>6</sup> Between the quiet, yet very public, display of the flag at the kindergarten and the threatening proclamation of the bumper sticker, there lie two different performances of suburban nationalism.

Suburban nationalism is not new, but the manner and frequency of its expression seem to be intensifying. The evidence is all around: from the burgeoning business of installing flagpoles in front yards, through the employment of the flag in political and commercial sloganeering, to the often unquestioned instances of politicians wrapping themselves metaphorically – and occasionally literally<sup>7</sup> – in the flag. The most obvious manifestation is the rapid rise in public displays of flags around Australia Day. At a quiet apartment in a downbeat seaside resort on a recent January 26, I counted no fewer than sixteen Australian flags around a small lap pool. Flag display on motor vehicles has also become commonplace. Months on from Australia Day, plastic flags regularly can be seen fluttering from passing cars. (The concatenation of motor vehicle and flag is itself intriguing. The car represents physical liberty to many; the flag, too, is often said to stand for liberty. Yet, while the plethora of different makes of cars is taken to express individuality, the flag's uniformity is meant to elide differences and unite the group.)<sup>8</sup>

<sup>5</sup> 'Blithe' in the sense of 'lightheartedly heedless'.

<sup>6</sup> An even brasher, if flagless, xenophobic slogan has since appeared: 'Fcuk Off, We're Full', emblazoned on a map of Australia.

<sup>7</sup> An image of Pauline Hanson, draped in the Australian flag, became a trademark poster for her One Nation Party and an autographed souvenir for her fans. The identification of the female form with ethnic virtue is a commonplace fantasy, softening the otherwise aggressive implications of exclusive group identities: Warner (1985), Chs 6–8.

<sup>8</sup> That car windows and bumpers are a common site for political speech is curious too: the highway was once the place for public gatherings and protests. Yet in modernity, cars do

The fetishisation of the flag as a cult object, which peaks on Australia Day and is renewed every Anzac Day, is so great that people have forgotten the quaint proclamation, by Governor-General Deane in 1996, of 3 September as 'National Flag Day'.<sup>9</sup> Some think it ironic that these flags are invariably manufactured in China. But there is no irony. A liberal trade regime and consumer capitalism, in which most consumer goods are sourced abroad, are as much defining features of modern Australia as tariff protection was a key feature of post-federation Australia.

A similar, if stronger, conjoining of flag-waving and consumerism was apparent in the United States in the wake of the attacks of September 11, 2001. As President Bush urged Americans to shop, freedom was equated with continuing consumption, inverting the historical equation of conflict and adversity with frugality and denial. Wal-Mart, the world's largest (and already ostentatiously patriotic) retailer was one obvious locus for this call to mercantile arms. Ready-to-fly flags were the first item on many shopping lists: on September 11 itself, Wal-Mart's flag sales leapt almost twenty-fold, quickly exhausting its stock of nearly 500,000 flags.<sup>10</sup> Such commodification of the flag was repeated across social classes, with a resurgence of interest in American folk art.<sup>11</sup> (Once, shared struggles were measured in blood, iron and sacrifice, through military service, manufacturing productivity and deprivation on rations. In the post-industrial society, what matters is maintaining the velocity of the money supply, in which the generation of credit can be cast as noble rather than selfish.)

Yet the flag is no ordinary object of status-seeking consumption. ABC TV's *Compass* program recently described flag flying as 'spiritual symbolism'.<sup>12</sup> Nationalism undoubtedly may *appear* to approximate a form of secular religion. Morisey, describing US flag observance, recites a familiar argument that American patriotism 'operates as a religion' and has an essentially 'religious nature'.<sup>13</sup> Flag-waving sometimes occurs with almost evangelical fervour. In their longer study of the 'totemic' flag rituals of American nationhood, Marvin and Ingle depict the use of the stars and stripes as 'magical and primitive', even essential to ward off the dissolution of nation.<sup>14</sup> These commentators employ 'religion' in either a metaphorical or a functionalist sense. Such a metaphorical usage is heard whenever proponents of criminalising flag-destruction frame the practice as flag 'desecration'. An example of a functional usage is Berlant's argument that a flag inscribes a 'National Symbolic', whose inclusiveness does not just

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not rally together; on the contrary, they compete and create, out of the public highway, a partly privatised space.

<sup>9</sup> *Commonwealth of Australia Gazette* No S321, 28 August 1996.

<sup>10</sup> Scanlon (2005), p 177.

<sup>11</sup> Scanlon (2005), p 181.

<sup>12</sup> ABC Television (2009).

<sup>13</sup> Morisey (2007), especially pp 5–12.

<sup>14</sup> Marvin and Ingle (1999), p 1.

merely cure citizenship of a formal emptiness, but whose lack may even generate an existential vulnerability through a sense of not-belonging.<sup>15</sup>

However, nationalism does not require a 'spiritual' or 'religious' attachment – unless we stretch those terms to embrace any form of tribalism or idolatry through which individuals identify with a group larger than their family and invest meaning in some shared social symbols. That nationalism is not inherently religious is revealed by the fact that these two forms of social and belief systems coexist. Whereas religions are typically exclusive of other religions and nationalisms are jealous of rivals, most religions live harmoniously alongside nationalism.<sup>16</sup> Certainly, in the protocols around flag usage we can see parallels with the rituals of religion. In a very broad sense of 'religious', people sometimes attribute an essentialising role to the flag. Yet not only are national flags not reliant on any religion,<sup>17</sup> for a flag to flourish it must proliferate in many profane environments, from the canopies of 4WDs to the bacchanalia of one-day cricket contests.

Nationalisms – indeed, nations themselves – are politico-legal fictions that have to be created and re-created. In Benedict Anderson's definition, a nation is 'an imagined political community [that is] imagined as both inherently limited and sovereign'.<sup>18</sup> Anderson's great insight was into the importance of the printed word in allowing the modern nation state, an eighteenth century construct, to invent the myths of its past necessary to maintain itself into the future. However, in their very nature, pre-literate symbols like flags (and heraldry more widely) have been used for much longer than words, and to enculturate loyalty to a much broader range of social orderings than nation-states.

As diagnosed in Michael Billig's *Banal Nationalism*, a feature of contemporary – especially Western – nationalism is its taken-for-grantedness. Like all prevailing ideologies, the phenomenon draws, rather than dissipates, power from the unnoticed and almost forgotten ways in which it suffuses cultural and political life.<sup>19</sup> In Billig's argument, the flag becomes a verb, a cute metaphor for a host of symbols, categories and language tropes that are employed routinely, usually without reflection, to discursively 'flag' and hence constitute the national order of 'us', 'the people'.<sup>20</sup>

In times of war, contemporary nation-states still marshal the older martial rhetoric about rallying around and dying for the flag. This occurs

<sup>15</sup> Berlant (1991), p 24.

<sup>16</sup> This applies whether the faith is global in its ambitions (eg Catholicism or Islam), global in its dimensions (eg Buddhism) or, conversely, has strong links to a national tradition (eg Anglicanism or Serbian Orthodoxy).

<sup>17</sup> This is not to say that a nation may choose to proclaim some official religious identity via its flag, though in the West who reads the crosses on the Union Jack or the Danish, Swiss or Swedish flags as anything other than geometric patterns of historical curiosity?

<sup>18</sup> Anderson (1983), p 6.

<sup>19</sup> Billig (1995). For a visual essay on Billig's relevance to Australia, see Allmark (2007).

<sup>20</sup> Billig (1995), Ch 5.

even outside times of conflict, and especially around contemporary Anzac Days.<sup>21</sup> These displays seek to infuse the flag with particular meanings, as if the flag were the inarticulate premise on which such sacrifices are assumed to have been made. Thus Australian legal academic Dan Meagher, while arguing for a robust freedom of communication, also valorises the flag's potentially atavistic qualities:

it has come to embody the people and events that forged and, in times of crisis, defended the democratic institutions and liberties that are the bedrock of the free, open and tolerant society that Australians enjoy and for which they are justifiably proud.<sup>22</sup>

In this process, without even the need to justify claims about which of many contested values the flag might embody, the flag reveals its special potential – but not as something sacred, for the flag cannot be holy; rather, the flag's potential accrues from the *official* nature of its birth: a flag is not so much created by its original designer as by the law's designation of it as a visual emblem for a whole. Its special status is thus born of the acknowledgement, if not reverence, it receives in its formal settings, most especially when hoisted on a pole in an official setting.<sup>23</sup>

It is in this sense that we can talk of flag fetishism. As both object and image, people attribute a power to the flag, a power they recognise over themselves and others with whom they share a body politic. It can be seen in the devotion of those most loyal to the flag, but also in the fixations of the flag-burner. It is a recognition of the power of the nation, but not its classic or 'hard' power (the state's monopolies over treasury, army and courts) so much as its mythical power to bind disparate peoples and regions together, transcending more organic group forms such as the family, clan or tribe.

The flag is an attempt by the body politic to distill its ethereal form in a flourish that is at once formal (the legal designation of an official flag) and informal (the flag is not a text, such as a constitutional preamble, attempting to distill a particular vision in contestable terms). Many entities, of course, seek to distill themselves in a simple visual form, whether through a traditional coat of arms or modern corporate branding. Bodies corporate may seek to manufacture some substantive – as opposed to legal – personality through their logos and get-ups. Yet, unlike such logos, the flag is neither intended to be, nor capable of being, captured and controlled. Its use is not monopolised, let alone its meanings determined by governmental advertising or rhetoric. The flag's unique, official status is not designed to erect a monopoly, but to encourage its almost viral use, through the fetish that is the shared acceptance of the power of the flag.

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<sup>21</sup> For a critique, see Lake et al (2010).

<sup>22</sup> Meagher (2009), pp 101–2.

<sup>23</sup> There is a quasi-religious element to flag use when the state buries its dead – for example, in the lowering of flags and their draping over the coffins of service personnel or police officers.

### *The Flag in Australia*

American culture, as Marvin and Ingle tell us, is 'holographically saturated' with its flag.<sup>24</sup> Traditionally, Australians believed themselves to exhibit a greater wariness of flag-waving than societies such as the United States. Whether true or not, this belief befitted the persistent assumption (if not national myth) that Australians are laconic and undemonstrative. It is also consistent with the argument that Australia was traditionally guided by social utilitarianism.<sup>25</sup> That is, without being overly statist, Australia was driven by pragmatism rather than by appeals to natural rights or over-arching ideologies, and was comfortable with a quiet egalitarianism in which government and law sought to maximise communal welfare. In this understanding of Australia, flags were for limited occasions such as governmental buildings and commemorations. That wariness of widespread flag-waving and display is clearly wearing away. It may be no coincidence that this rise in flag-waving coincided with the Howard government's efforts to foster a national identity and narrative. Examples of such efforts include the ubiquitous branding of activities and programs with the coat of arms,<sup>26</sup> the institution of a citizenship test and the moves to a national history curriculum.

This view of Australia as formerly agnostic about flag observance was always a partial fiction. For a segment of the population, flags have been critical markers of fealty and expressions of identity. Thus flags have long been used to display pride in competitive settings, such as during wartime or sporting contests. The Australian flag, however, had a rival in the Union Jack, which persisted well into the second half of the twentieth century – despite the passing of the *Flags Act 1953* –<sup>27</sup> as a symbol of a people-within-an-Empire, and of allegiance to the Crown. The Union Jack was commonplace in halls and during public meetings. Generations of Australian schoolchildren were required to observe the Union Jack and, well into the 1970s, to sing *God Save the Queen*. Perhaps because of that uneasy division, uniquely Australian symbols took time to be fully embraced. But in recent years the words of *Advance Australia Fair* (or at least its first verse and chorus) have become second nature to the children brought up on them. Similarly, everyday acts of flag display – whether through flag-flying on cars, at private kindergartens and even flag-burning – have taken root today.

Undeniably, there is a racial element to some of this. The flag was utterly central to the Hansonite One Nation movement. Whether tattooed on the skin, painted on the face and worn to the Cronulla race riots, or

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<sup>24</sup> Marvin and Ingle (1999), p 5.

<sup>25</sup> Collins (1985).

<sup>26</sup> Such branding covers not just governmental activities but some private activity, in the case of creative work given Australia Council for the Arts funding: Orr (2007), pp 24–26 (including n 25).

<sup>27</sup> *Flags Act 1953* (Cth): 'An Act to declare a certain Flag to be the Australian National Flag and to make other provision with respect to Flags'.

brandished at a Big Day Out rock concert,<sup>28</sup> many now appropriate the Australian flag as an expression of a narrow brand of 'Aussie' nationalism. In its more militant uses, the flag is wielded confrontationally – as a symbolic weapon – against whichever recently arrived ethnic group is accused of failing to assimilate.

Yet such stridency is far from the received version of nationalism. There are various overlapping, sometimes conflicting, versions of what it means to be 'Australian'. Adapting George Orwell,<sup>29</sup> former Prime Minister Keating sought to distinguish 'nationalism' (bad) from 'patriotism' (good).<sup>30</sup> At first the distinction seems inapt. 'Patriotism', in Samuel Johnson's epigram, is 'the last refuge of a scoundrel'. However, Johnson was not impugning all love of country. Rather, he was chastising both those who think 'my country, right or wrong', and those who would prey on such sentiments – such as politicians who manipulate citizens to elevate patriotic urges and commitments into an ideology.

Keating's partisan claim was that nationalistic sentiment under then Prime Minister Howard played a putative mainstream against multiculturalism and non-European immigration.<sup>31</sup> Keating's – or rather Orwell's – less partisan point was to seek to separate a potentially exclusionary, negative and manipulable force (labelled 'nationalism') from a more positive sentiment, a love of country in the sense of land and place that may have an inclusive embrace (labelled 'patriotism'). In practice, of course, the distinction is mutable: patriotisms can obviously clash, especially when two different groups have attachments to the same land.

## The Law of Flag Protection and Destruction

Of all the various symbols, formal and informal, that peoples and nations create and adopt, flags attract a peculiar legal as well as popular interest. In modern, logomachic societies, flags are not constitutional devices in the legal sense, but they are constitutive in the broader sense. Recognising that its own abstraction is a source of frailty, the formal legal order needs to give special status to key elements of the figurative order on which it relies for fealty. In the shift from identifying legal rule with an identifiable human figure like a monarch, bureaucratic democracies crave identifying features in the form of symbols rather than in the form of their functional institutions. (Indeed, the functional and the symbolic often do not overlap. Symbolic engagement may generate what psychologists call 'ingroup identification' without engendering any understanding of, let alone engagement with,

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<sup>28</sup> *The Age Online* (2007).

<sup>29</sup> Orwell (1968), Vol III, p 362. For critique, see Viroli (1997).

<sup>30</sup> ABC Radio, *AM* (2007).

<sup>31</sup> Keating was a little hypocritical. Some saw his appeals to the Republic, Indigenous reconciliation and Australia as an Asian nation as an attempt to erect a new kind of nationalism on the dreams of the old. Keating certainly engaged in nationalistic myth-making, notably in his Kokoda speech.



political and governmental processes.)<sup>32</sup> This constitutive or identifying ideal was captured recently by Governor-General Quentin Bryce's hope that the flag 'wherever it is raised ... stirs in us a sense of unity' and a sense of being 'a small part of a great story'.<sup>33</sup>

An array of visual symbols can be employed to metaphorically represent the whole, from coats of arms to floral emblems. Yet, of these, official flags have proven the most reliable and versatile. Why this is so is not entirely clear: perhaps flags present an ideal mix of the concrete/sensual<sup>34</sup> (their colours, their adaptability to different fashion usages, their scenic dimension when flown) and the formal (their fixed layout, the protocols around them). The easy iterability of flags also contributes to their popularity. While music is portable and reproducible, and might be expected to evoke positive emotions more directly than a flag, to modern ears most national anthems sound dated, even dirgeful.

Whatever the reason for the pre-eminence of the flag in the non-verbal propaganda of the state, it is no coincidence that the law accords the flag distinct status but equivocal protection, mainly in the form of weak exhortations relating to its dignity and official use.<sup>35</sup> Normally when the law intervenes to regulate the use of symbols, it is to erect a monopoly – for instance, in the granting of honours and 'state' funerals, or over a royal style or trademarks generally. Regulation of flags is to the contrary: their official designation is a precursor to presenting the flag as if it were an endlessly reproducible gift to a people. In the following sections, I elaborate on flag law, both internationally and in Australia, to reveal two underlying legal purposes. The first is to designate the flag as something unique. The second is to avoid over-regulating or constraining its use, lest the flag become something untouchable, the badge of a distant and formal governmentality rather than an object of a widespread fetish.

## Overseas

The United States is the most obvious starting point for an exploration of debates over flag law and practice. This is not merely because flag-burning has been particularly prominent and controversial – and flag fetishism has reached significant heights – there. Nor is it because the United States is an inherently flag-revering nation. As has often been noted, the stars and stripes only came to play a significant role in American public life during the civil war of the 1860s and 1870s – and then, of course, initially only in the north.<sup>36</sup>

<sup>32</sup> Schatz and Lavine (2007), especially pp 351–52.

<sup>33</sup> Governor-General of the Commonwealth of Australia (2009).

<sup>34</sup> Fetishes after all typically centre on objects with a sensual dimension.

<sup>35</sup> In contrast, the Australian coat of arms has no legislative status. It exists, quaintly, through an ongoing Royal Warrant granting the second Commonwealth Coat of Arms, 19 September 1912: [www.itsanhonour.gov.au/coat-arms/royal\\_warrant.cfm](http://www.itsanhonour.gov.au/coat-arms/royal_warrant.cfm).

<sup>36</sup> For example, Sullenger (2005), pp 599–600.

Instead, the United States is an obvious starting point because it exhibits clearly some of the tensions inherent in liberal nationalism. To different degrees, every state exploits symbols such as the flag to mould coherence from a disparate community and give meaning to the otherwise formal status of citizenship. Methodologically conservative elements of the body politic then go to particular lengths to promote identification with national symbols. Examples in the United States include enforced pledges of allegiance and flag observance in schools. This, of course, can be done to excess. Flag Day in the United States morphed into Flag Week,<sup>37</sup> and the purpose of setting aside a unique day for flag observance has been diluted. Aside from Flag Day, no fewer than fourteen other non-holidays are marked by presidentially proclaimed exhortations to fly the flag.<sup>38</sup> Even those commemorations are lost in a swag of patriotic holidays, and rendered somewhat redundant by the fact that, year round, the law requires all public institutions, including schools, to display the flag during daylight hours.<sup>39</sup> As one observer commented: 'In the United States, every day is Flag Day.'<sup>40</sup> US federal law even declares, in a metonymic flourish, that 'the flag represents a living country and is itself considered a living thing'.<sup>41</sup> This animation of the flag manifests itself in many ways. The most obvious current example is the recent convention that US politicians wear a flag pin<sup>42</sup> on their left lapel so as to be near their heart.<sup>43</sup> Another is the rule that an old flag, like a dying person, deserves a dignified farewell and (private) cremation.<sup>44</sup>

Yet countervailing liberal elements in the legal order seek to avoid turning nationalism into a compulsory principle, and act to restrain the majoritarian impulse to impose beliefs on minorities and dissentients. The US Code, for instance, does not erect a net of prohibitions around the use of the flag. It erects only a minor offence against printing advertising slogans on a flag or representation of a flag, or printing a flag on commercial merchandise.<sup>45</sup> The flag or variants of its colours are in any event *routinely* used in commercial, political and other marketing. Under the national law

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<sup>37</sup> 36 USC §§ 110, 122.

<sup>38</sup> Constitution and Citizenship Day, Columbus Day, Father's Day, Mother's Day, Gold Star Mother's Day, Loyalty Day, Aviation Day, Aviation Day, Maritime Day, Korean War Veterans Armistice Day, Pearl Harbor Remembrance Day, Peace Officers Memorial Day, Police Week, Thomas Jefferson's Birthday and Patriot (or 9/11) Day: 36 US Code IA, Ch 1

<sup>39</sup> 4 USC § 6.

<sup>40</sup> Rodriguez (2010).

<sup>41</sup> 4 US Code § 8(j).

<sup>42</sup> A convention that has become an irresistible expectation; even, or perhaps especially, Barack Obama relented and bowed to the pressure to conform when he was running for President.

<sup>43</sup> 4 USC § 8(j), and see also § 9 on civilians covering their hearts with their right hands during flag ceremonies.

<sup>44</sup> 4 USC § 8(k).

<sup>45</sup> 4 USC § 3. This covers Washington DC only.

that gives the US flag its status, then, there is no attempt to monopolise the flag as if it were a nationally controlled trademark. Instead, the flag is set free with, at most, exhortations that its physical form be shown no 'disrespect'.<sup>46</sup>

In the United States, this permissive legal order is most prominent in the First Amendment guarantee of free speech.<sup>47</sup> The US flag debate famously came into clearest legal relief in *Texas v Johnson*.<sup>48</sup> There, Gregory Johnson burnt the US flag during a protest outside the 1984 Republican National Convention. His fine of US\$2000 for breaching Texan law (a hefty sum at the time, especially for a radical activist) was upheld by a state appellate court. But by a bare five to four majority, the US Supreme Court struck down the anti-flag-abuse law.

The court held, unsurprisingly, that the act of burning a flag at a political protest was expressive and communicative. Texan authorities put forward two governmental interests in criminalising flag-destruction: keeping the peace, and protecting a unifying national symbol. The majority, however, identified these interests as inseparable from expression. Once it was seen as a criminal law targeting a purely expressive act, the law failed strict scrutiny under US free speech doctrine.<sup>49</sup> However, Justice Stevens – otherwise the leading liberal on the court – wrote a passionate dissent, rooted in his wartime service and belief that the flag 'uniquely symbolised' struggles for 'liberty and equality'.<sup>50</sup>

Reflecting the fetishism underlying the dispute, the Supreme Court's pronouncement in *Texas v Johnson* (and its affirmation in *US v Eichman*)<sup>51</sup> initially inflamed, rather than settled, contention about criminalising flag-destruction. On numerous occasions since, the US House of Representatives has voted to overturn the decision by endorsing a constitutional amendment to protect the US flag – something all 50 state legislatures have endorsed. Clearly the flag's status is not something amenable to polite policy disagreements or reasoned precedent. Rather, the very *idea* of a flag serves as an invitation to broader debates about identity and values.

<sup>46</sup> 4 USC § 8 (which is said to include 'advertising' and being printed on 'anything designed for temporary use and discard': § 8(i)). '[T]he Flag Code does not prescribe any penalties for non-compliance nor does it include enforcement provisions; rather the Code functions simply as a guide to be voluntarily followed by civilians and civilian groups': Luckey (2008). Some states retain laws seeking to restrict the use of the flag (eg in advertising), but these are unenforced and – following first amendment case law, unenforceable.

<sup>47</sup> 'Congress shall make no law ... abridging the freedom of speech'.

<sup>48</sup> *Texas v Johnson* 491 US 397 (1989). Similarly, see *US v Eichmann* 496 US 310 (1990).

<sup>49</sup> In contrast, the burning of a draft card was criminalisable, since such a law helped preserve the integrity of the selection system (of which the card was a key element), and was not necessarily directed at anti-conscription protestors: *US v O'Brien* 391 US 367 (1968).

<sup>50</sup> *Texas v Johnson* 491 US 397 (1989) at 437.

<sup>51</sup> *US v Eichman* 496 US 310 (1990).

Closer to home – geographically and culturally<sup>52</sup> – flag-burning has become an issue in New Zealand in recent years. The New Zealand national flag is legislatively declared to be ‘the symbol of the Realm, Government, and people of New Zealand’.<sup>53</sup> The most prominent case has been *Hopkinson v Police*.<sup>54</sup> Demonstrating outside Parliament in Wellington against the visit of the Australian Prime Minister during the invasion of Iraq, Paul Hopkinson burnt an upside-down New Zealand flag. A fellow protestor burnt the Australian flag as well. Hopkinson was fined NZ\$600 for the offence of public destruction of the flag with intent to dishonour it.<sup>55</sup>

On appeal to the High Court, Ellen France J overturned the conviction. She held that freedom of expression and assembly required the term ‘dishonour’ to be read narrowly.<sup>56</sup> Although ‘dishonour’ would ordinarily embrace the indignity of being immolated in kerosene, the narrower meaning of ‘defile’ or ‘vilify’ was also open. This reads a heavily subjective element into what is otherwise a purely material offence of destroying an object in public. It may even leave the offence of flag-destruction only available in rare or gratuitous defacements, like wiping it on one’s buttocks or, as one lawyer has suggested, where the flag is targeted for its own sake – say, by republicans.<sup>57</sup>

New Zealand authorities subsequently resorted to the lesser offence of offensive behaviour to charge one of Hopkinson’s fellow peace activists, Valerie Morse, with flag-burning at an Anzac Day dawn service in protest at New Zealand’s military deployment in Afghanistan. The flag was ignited at the same moment another protestor blew a trumpet to disrupt the commemoration. Given this context, the Court of Appeal upheld her conviction: the protest was designed to offend the sensitivity of the dawn service.<sup>58</sup> But the court avoided creating a rule against flag-burning. Only the intrusion of the protest into another expressive gathering justified the finding. (Morse is appealing and the Supreme Court is to give the matter final consideration.) What is important about both the *Hopkinson* and *Morse* cases is the reluctance of the law to unduly restrict the flag’s use, consistent with the idea that the flag is neither owned by the state nor some sub-set of its people, but is a gift to all.

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<sup>52</sup> The New Zealand and Australian flags are so similar as to be indistinguishable to most outsiders.

<sup>53</sup> *Flags, Emblems and Names Protection Act 1981* (NZ), s 5(2).

<sup>54</sup> *Hopkinson v Police* [2004] 3 NZLR 704.

<sup>55</sup> *Flags, Emblems and Names Protection Act 1981* (NZ), s 11(1)(b).

<sup>56</sup> *Hopkinson v Police* [2004] 3 NZLR 704, applying *New Zealand Bill of Rights Act 1990* (NZ), ss 14, 16.

<sup>57</sup> Price (2010).

<sup>58</sup> *R v Morse* [2009] NZCA 623.

### *Flag Status in Australia*

The legal status of the Australian flag has been anchored for over half a century in the *Flags Act 1953* (Cth). That statute sets out the design of the flag and declares the blue version to be 'the Australian National Flag'.<sup>59</sup> The Governor-General is then empowered to make 'rules' – in truth, ceremonial protocols – about the method of flying the flag. But these merely consist of exhortations not to show indignity to the national flag, such as by flying it below another flag or letting it touch the ground. The two flags established directly by the Act are the standard national flag on a blue backdrop, as well as a red version as a merchant shipping ensign (reflecting the historical importance of shipping and the need for a colour contrasting with the sea and sky). Neither flag was present at Federation itself. Instead, they emerged after a local competition and were vetted by the British government before gazetting by the Australian government.<sup>60</sup>

There is also an official Australian Aboriginal flag and a Torres Strait Islander flag. Although their copyright does not lie with the Crown,<sup>61</sup> their status as sub-national flags was proclaimed under the *Flags Act* in 1995 and 2008 respectively. Olympian Cathy Freeman was simultaneously lauded and excoriated for parading with both the Australian national and Australian Aboriginal flags at the height of her success.<sup>62</sup> Her gesture only worked because she presented the Aboriginal flag as a supplement, and not a challenge, to the national flag. The Indigenous flags have since been incorporated routinely into governmental ceremonies under both conservative and Labor administrations.<sup>63</sup> By contrast, the Eureka Stockade banner, which is sometimes touted as a rival to and even replacement for the national flag, lacks any official status.<sup>64</sup>

In 1998, the Howard government sought to entrench the status of the national flag. Although – unlike Australia's anthem<sup>65</sup> – its national flag was not adopted by a plebiscite or referendum, the *Flags Act* now says it can only be changed by referendum.<sup>66</sup> Perhaps befitting the regulation of flags, this amendment was essentially symbolic and political. Since only the

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<sup>59</sup> *Flags Act 1953* (Cth), s 3, Sch 1.

<sup>60</sup> For a full history of the Australian flag, see Kwan (2006). Sub-national flags proliferate: variants include light blue (Air Force), white (Navy) and light blue with dark blue cross (Civil Aviation). The Defence Force has its own completely distinct flag. Even the Customs Service has its own flag: a dull variant of the standard Australian flag with 'Customs' emblazoned across it in white ink.

<sup>61</sup> The Indigenous flag is copyright to its designer; the Torres Strait flag is copyright to the Island Coordinating Council: Australian Government (nd).

<sup>62</sup> Devetak (2003), Ch 2.

<sup>63</sup> Despite Prime Minister Howard having previously objected to their official recognition as divisive: White (2008), p 5.

<sup>64</sup> Indeed, Prime Minister Howard forbade it from being flown at Parliament House.

<sup>65</sup> By plebiscite in 1977; 'Advance Australia Fair' was proclaimed as the anthem in 1984: Orr (2000), p 119.

<sup>66</sup> *Flags Act 1953* (Cth), s 3(2).

Constitution is higher law, a later Parliament may simply undo the entrenchment to alter the flag.<sup>67</sup> The real meaning of the 'entrenchment' lay outside any legal effect it purported to have. It was an act of political theatre, a dare to 'stand up and be counted' for the current flag's design. That it occurred at all presupposed a degree of fetishism of the flag in the wider electorate.

Attempts at limiting uses of the flag in Australia have invariably foundered. A year after the Cronulla race riots of late 2005, the organisers of the Big Day Out rock concert banned patrons from bringing flags (of any nationality) into the event. Besides the concern that one person's flag-waving obscures the view of others, the organisers argued that the flag was politicising a musical event.<sup>68</sup> The decision might have passed with little fanfare, as a passing act of proprietorial censorship. However, the flag's public status transcends such public/private analysis. Then Prime Minister Howard and opposition leader Kevin Rudd joined in fulminating that the ban was a gross form of 'political correctness'.<sup>69</sup> New South Wales' then opposition leader even proposed legislation to neuter any private ban of public displays of the Australian flag.<sup>70</sup>

An ambivalent reception also greeted a 2004 announcement by federal Education Minister Brendan Nelson that tied school funding to a requirement that each school maintain a 'working' flagpole for the Australian flag. Conditional grants are commonplace in federal regulation, but usually there is a clear link between the policy area and the condition of funding (for instance, between receipt of funding and educational quality). The minister's critics read the gesture as another salvo in the 'culture' wars.<sup>71</sup> Certainly, viewed pragmatically, the policy appeared otiose and heavy-handed: otiose since most schools already flew the flag,<sup>72</sup> and heavy-handed since schools that lacked the money to build and maintain a flagpole had, by definition, more pressing needs.<sup>73</sup> But there was a logic to the government's action. Borrowing from US practice, mandating flag-flying at schools extends the flag's formal status into the physical environment of compulsory education, furthering its potential fetishisation.

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<sup>67</sup> A government would not do so unless it had broad support – lest it appear afraid of a vote on this issue. But no government would be likely to propose a change of flag unless there were broad support to begin with. So the amendment had neither legal efficacy nor even any political necessity.

<sup>68</sup> ABC Radio, *PM* (2007).

<sup>69</sup> ABC Radio, *PM* (2007).

<sup>70</sup> Echoing the *Freedom to Display the American Flag Act 2005* (US), which prevents bodies like residential body corporates from restricting their members displaying the flag. In contrast, his state counterpart, Premier Iemma, accused him of politicising a social issue that required no further legislation. See Pearlman and Dunn (2007).

<sup>71</sup> Clark (2006).

<sup>72</sup> 'The Australian Flag should be flown at State Government schools along with the Queensland Flag where possible.' Queensland Government (2009), p 26.

<sup>73</sup> Clark (2006).

### *Flag Destruction in Australia*

Flag-burning has occurred in Australia as part of social and political protest. Examples include burnings by an Indigenous activist on 'Invasion Day' (Australia Day),<sup>74</sup> and by a Lebanese-Australian during the Cronulla race riots.<sup>75</sup> In Australia, however, there is no specific law against flag destruction,<sup>76</sup> merely general offences such as disorderly or dangerous conduct and destruction of private or government property.<sup>77</sup> The flag is not a necessary element of such offences. There have been attempts to legislate an offence of destroying an Australian flag. In 2003, 2006 and 2008, Private Members' Bills were presented to 'prevent the desecration or wilful destruction' of Australian flags.<sup>78</sup> The 2008 Bill would have criminalised acts 'wilfully damaging, destroying, burning, defacing, mutilating or trampling upon or otherwise desecrating an official flag'.<sup>79</sup> Penalties proposed have been low key: a maximum fine of two penalty units (approximately \$220) or a community service order. Such Bills have fallen on deaf ears. Prime Minister Howard declined to support an offence of flag-destruction, giving reasons similar to his refusal to directly attack ultra-nationalist Pauline Hanson, namely that it could draw attention to or even martyr the cause.

There is a nice argument about whether such a law would infringe the implied freedom of political communication.<sup>80</sup> The answer lies somewhere between *Levy v Victoria*<sup>81</sup> and *Coleman v Power*.<sup>82</sup> The former case permitted laws restricting protest on safety grounds; the latter case overturned an offence of 'insulting words' in public. In strictly legal terms, of course, a flag cannot possess civil rights, though it is feasible that the High Court might eschew liberal reasoning and take a non-instrumental view of the flag as something unique, with a dignity susceptible of legal protection. It is even possible, as Dan Meagher reasons, that the court could adopt a 'pro-civility', as opposed to a 'robust', conception of communicative freedom.<sup>83</sup> Either approach would permit a prohibition on the wilful destruction of flags in settings intended to cause offence.

However, the Australian High Court is more likely to follow the US approach. Mr Coleman, as it happened, tested the lower courts with an act of

<sup>74</sup> *ABC News Online* (2008).

<sup>75</sup> *Daily Telegraph* (Sydney) (2006).

<sup>76</sup> Stobbs (2006), pp 20–21. For detailed discussion of such legislative attempts, see Meagher (2009).

<sup>77</sup> Stobbs (2006).

<sup>78</sup> For example, Flags (Protection of Australian Flags) Amendment Bill 2008 (Cth), sponsored by a Liberal Senator.

<sup>79</sup> A list that almost seems designed to give protestors ideas.

<sup>80</sup> Meagher (2009), pp 87–95.

<sup>81</sup> *Levy v Victoria* (1997) 189 CLR 579.

<sup>82</sup> *Coleman v Power* (2004) 220 CLR 1.

<sup>83</sup> Meagher (2009), pp 89–95.

flag-burning in 2001. He was arrested after igniting a large flag at an outdoors Australia Day gathering and citizenship ceremony, to protest the treatment of asylum seekers. Although his efforts were somewhat risible (onlookers laughed, rather than taking offence, at his initially unsuccessful attempts to light the flag), the magistrate convicted him on a charge of disorderly behaviour. In *Coleman v Kinbacher*, the Queensland Court of Appeal upheld the conviction, but only on the grounds that the size of the flag and proximity of a large crowd made the action not so much politically provocative as physically dangerous and alarming.<sup>84</sup> Had Coleman taken more physical care, he was free to burn flags in public.

The Queensland Court for its part followed a Northern Territory decision of *Watson v Trenery*.<sup>85</sup> In that case, pro-Timorese demonstrators who torched 20 Indonesian flags were acquitted of disorderly behaviour, as the setting and size of the flags and flames posed only the most minor danger or disruption to others. This approach of measuring disorderly conduct on a purely objective scale is even kinder to flag-burners than *Morse* in New Zealand, where an intent to offend was invoked. But again, the lesson for present purposes is not about constitutional speech doctrine, but that the law is reluctant to limit the use of the flag, since its underlying purpose is to give birth to the flag but then present it to 'the people'.

### *Making Sense of Flag Destruction*

Unless we anthropomorphise the flag, the real interests being advanced by any law seeking to protect (rather than merely establish) a flag are not the interests of 'the flag', but:

- (a) the sensibilities of those who hold the flag in special reverence, and
- (b) the state interest in the flag as a symbol to engender a collective *esprit de corps*.

Even if one accepts those interests as justifying flag protection laws, a problem arises as to the reach of such laws. Are only physical flags protected, or do the laws control any representation of the flag? The flag is essentially an image, albeit in a traditionally tangible, cloth form. If it were a wrong to deface a 'real' flag, even to make a political point, is it not the same kind of wrong to depict, say, someone urinating on a flag, to make the same point?<sup>86</sup>

As Eric Posner suggests, laws against flag-destruction may only serve to reify the flag's symbolism.<sup>87</sup> If so, they invite the very thing they purport to prohibit, and not merely because enforcing these laws risks martyring and drawing attention to the protestors concerned. Such laws risk elevating the

<sup>84</sup> *Coleman v Kinbacher* [2003] QCA 575.

<sup>85</sup> *Watson v Trenery* (1998) 122 NTR 1.

<sup>86</sup> The German Constitutional Court faced that very issue, and held in that case that freedom of artistic expression meant the prohibition on desecrating the flag should not apply: Quint (1992).

<sup>87</sup> Posner (1998), p 798.



flag beyond fetish to taboo: they render its defacement a peculiarly satisfying transgression above and beyond any shock value to any witnesses.

In Western societies, legal norms isolating the flag for special protection may also present an unusual structure: can something which its supporters routinely claim symbolises liberal freedoms be protected by a law that limits expressive displays and the liberty to control, even destroy, one's own property? It is difficult to find a real analogy for laws criminalising flag-destruction. Prohibitions against destroying currency are inapt. While currency can be fetishised and it is intimately linked to national identity and power, prohibitions on destroying currency have the instrumental aim of ensuring a state monopoly on its supply, dating to a time when legal tender (rather than credit) was the chief repository of value.<sup>88</sup> Flag-destruction offences hardly aim to protect or control the supply of flags. On the contrary, the law wants the flag to proliferate. Prohibitions on destroying artefacts are similarly distinguishable. While its design is unique, no individual flag is – indeed, the flag draws strength and solidarity from its easy reproducibility.

Destroying or defacing the flag can itself become a meta-ritual, not merely an individual act of expression but a rolling affront to social norms. Any act as mannered or planned as bringing a flag to a demonstration, with inflammatory liquid, is a self-reflexive rather than spontaneous act of dissent. Part of the intent is to attract and outrage public attention, preferably via the media. Performed with such deliberation, flag-burning is a poor man's PR stunt. If overdone, such protest can become a cliché, a childish attempt to provoke reaction, whose shock value – like that of swearing – may only dilute over time. In New Zealand, Morse's lead in burning her country's flag at an Anzac Day Service was taken a banal step further in 2009, when a student burnt a flag outside a Victoria University of Wellington Student Association meeting. The purpose of the meeting was not to commemorate Anzac Day, but merely 'to *debate* [the Student Association's] rejection of a Wellington City Council *invitation*' to lay an ANZAC wreath the *previous* month.<sup>89</sup>

Eric Posner enunciates a similar theme, albeit clad in the language of law and economics (of 'separating equilibrium' and 'passive pooling equilibrium').<sup>90</sup> The power of a symbol, he points out, cannot be legislated. If everyone saluted the flag, the act would have little meaning other than that failure to conform would demark someone as a blatant dissenter. Conversely, if few people respect a flag, its social meaning dissipates to the point where defying or destroying it becomes meaningless. As Justice Stevens – the liberal who would have upheld flag-destruction laws in the United States – confessed to a journalist recently:

<sup>88</sup> Prohibitions against destruction of legal tender may also have originated in an attempt to reassure the currency fetishist unnerved by the shift from 'real' coin made of indestructible metal like gold and silver.

<sup>89</sup> *Otago Daily Times Online* (2009), emphasis added.

<sup>90</sup> Posner (1998), pp 789–95.

The funny thing about [*Texas v Johnson*] is, the only consequence of it – nobody burns flags anymore ... It was an important symbolic form of protest at the time. But nobody does it anymore. As long as it's legal, it's not a big deal.<sup>91</sup>

## Conclusion: Value Without Values

Flags, historically, were about 'sides'. Their use in battles literally demarked which side one was on. While the modern nation is not essentially a martial construct, elements of this signalling of 'insider' versus 'outsider' remain, most obviously in the deployment of national flags at sporting events. Keating and Orwell captured this tendency to exclusiveness in their distinction between nationalism and patriotism. In this dichotomy, there is a world of difference between the injunction to 'Support it. Or F#ck off' and the invitation to quietly raise and lower the flag each day at a kindergarten. And the difference is not simply in the militancy of the former and the quiet tenor of the latter, although clearly one is a respectful gesture, potentially expressing an inclusive idea of the nation-as-a community, in a way the other is not.

Rather, to borrow from Billig, the quiet raising of a flag at a kindergarten is an act of 'banal' rather than bellicose nationalism. Its relative subtlety paradoxically renders it a stronger gesture, especially in a polity that seeks to project stability and restraint. Yet both the bumper sticker and the kindergarten flag-pole are instances of 'flag-waving' in the sense of being overt and public displays of the flag. Both perform an attachment to the flag. Is there any meaning to which both attach?

My argument has been that the flag is an important, albeit empty, gift. Especially in a pluralistic nation, the flag embodies no values. This essay opened with a reflection on flags at kindergartens. As a Canadian study has shown, children as young as six recognise that flags are, at root, entirely conventional.<sup>92</sup> It takes some time for children to come to see flags as bearing any symbolic meaning.<sup>93</sup> If they attribute any meaning to them, younger children see flags in functional terms, as a marker of place. They reason that it is worse to burn a country's map than its flag, because a map has a clearly practical use.<sup>94</sup>

In this childish view of the flag lies a superficial insight. The closest any flag comes to having an objective meaning is as a geographical and geopolitical signpost. Obviously, no Australian flies the flag as a courtesy to Martians or bewildered foreigners who find themselves lost on this territory. Yet a flag outside a consulate does signal 'you are on this nation's territory' and a flag in a sporting crowd signals 'that's the team I'm supporting'. That

<sup>91</sup> Toobin (2010), p 43. Similarly, see Stevens' prognostication in *US v Eichman* 496 US 310 (1990) at 323.

<sup>92</sup> Helwig and Prencipe (1999), p 140.

<sup>93</sup> Weinstein (1957).

<sup>94</sup> Helwig and Prencipe (1999), p 140.

signage role can be linked to a larger boundary-drawing purpose implicit in the official designation of a national flag as a unifying emblem. To say that the Australian flag stands for 'Australianness' is to risk tautology, but it is a necessarily empty formulation. Once the flag moves outside its narrow signalling role and becomes embraced in general community usage, each Australian has still to imagine what (if anything) binds them to their neighbours, and them to everyone else who inhabits this continent.

Seeing the flag as an emblem of 'Australianness' does not mean the flag is inherently a denial of whatever lies outside the nation. Certainly, as the otherwise disparate experiences of flag-consumption after September 11, flag-waving on ANZAC Day and xenophobic 'Support it. Or F\*#k off' stickers reveal, a sense of conflict can be a potent enhancement to attachments to the flag. However, that conflict need not be exogenous to the nation; the conflict more commonly and naturally arises from within the state, as flags serve as 'amplifying mirrors of social, political and cultural changes and competitions'.<sup>95</sup> The flag, *a priori*, captures no particular set of such values.

Though it may seem unlikely, a 'kindy dad' could run the flag up the flagpole and, in his heart, believe it stands for White Australia. We might watch children smiling while they gaze at a flag without knowing if they are revering it and enjoying a sense of incipient national identity, are just enjoying the sight of blue flag billowing against blue sky, or are merely stifling a yawn with an inane smile. Similarly, someone may drive a car with a 'Keep this our Flag Forever' sticker on it, and believe she is counselling respect for a radical history, the way adherents of the Eureka flag do.<sup>96</sup> Only when we begin to introduce more context, such as evidence of motivation and audience, can we begin to 'read' any particular use of the flag. Thus a teenager, wrapping their bare skin in a flag on the way to an ethnically charged confrontation at the beach, is sending fairly unambiguous signals; yet if another teenager climbed her school flagpole and took the flag for a lap of her school's athletic carnival, the meaning might be entirely ironic.

Even the flag burner expresses no necessary message. He or she may be burning the flag as a spectacle, an incendiary device to attract attention to an underlying message (just as street marches and strikes are not inherently radical activities, but time-honoured forms of attracting attention to a cause). Alternatively, a flag may be burnt as shorthand for something specific, such as the policies of the current administration, or a particular foreign policy. Or a flag might simply be burnt to be nihilistic or gratuitously insulting.

None of this is to say that a flag is devoid of meaning; rather, it can embrace a plethora of meanings. Conservatives tend to accentuate national pride, and presume the flag represents values such as loyalty to ethnic roots (accenting the Union Jack) or, more recently, unity (accenting the federation star). But progressives are increasingly being encouraged to fly the flag – for

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<sup>95</sup> Foret (2009), p 313.

<sup>96</sup> Compare the discussion of attempts to 'reconstruct' the Union Jack to give it progressive connotations in Reichl (2004).

instance, at trade union rallies. Labor Party iconography has long drawn on the Australian flag. Its most distinctive feature, the southern cross, can be seen as an emblem of benevolent nature, shining equally on all of us. As Elizabeth Kwan demonstrates, the Australian flag was a particularly contested device in the aftermath of World War I: Catholics of Irish descent happily saw in it a relegation of the Union Jack.<sup>97</sup> Today, the reverse holds true, with some republicans calling for a new design, against monarchists who honour the Union Jack's remnant place on the flag's hoist. As we noted at the outset, it might hardly matter if the present flag were replaced, say, with the boxing kangaroo emblem.<sup>98</sup> Once the shock of the new faded, conservatives could see it as an expression of pugnacious individualism and radicals could see it as a sign of the underdog spirit.

What is ultimately significant is, first, that the flag *matters* to so many people, whether they are flag observant or sceptical, nationalists or internationalists. The flag's continuing relevance depends on its being the subject of a commonplace, not an obscure, fetish and the site for popular, rather than elite or academic, debates and protests about values and identity. Second, it matters that there is only one flag designated for a particular purpose. In theory, we could have multiple Australian flags, each one cleverly echoing some particular national myth or characteristic, each one *prêt à porter* for suitable events or occasions. But then, who would bother? There would be a diffusion of interest because there would be nothing singular to rally around, or against. The national flag would no longer occupy its place in the law as a singular gift of the state to the people it purports to serve.

That gift is often interpreted as a conservative thing, for undoubtedly the state has an interest in its own longevity and stability, and hence the flag is designated with an intention to bind. But it is not a Trojan gift, since a flag no more imposes a smothering uniformity than it offers a shared space, an object on to which we can project our contested values. The law's designation of an official flag is a gift to the people, an invitation to society to interpret and employ the flag in a multiplicity of ways, whether civilly or provocatively, whether quietly or brazenly, whether as an easy commercial backdrop or as an ironic gesture. A flag's proliferation entrenches its status, but its status is rooted in the unique position given to it by law, out of which the fixation around it is born. There is little that irreducibly unites different acts of flag-waving, or for that matter different occasions of flag-destruction, aside from that fetishism. But flag promoters and flag detractors rally, if unwittingly, around one theme: a flag has value, even if we cannot agree on its values. The antithesis of flag-waving would not so much be flag-burning as it would be flag apathy.

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<sup>97</sup> Kwan (1994).

<sup>98</sup> It would hardly matter to Australians squabbling over its meaning; to outsiders used to staid designs, such a cartoon image would seem either revolutionary or risible.

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### A Fetishised Gift: The Legal Status of Flags

Orr, Graeme<sup>1</sup>

**Abstract:** Accounts of the relationship between flags and the law have focused on a narrow strain of contentions drawn from debates about political expression. This essay seeks to bridge the gap between cultural studies' insight into nationalism and its symbolics, and the flag's legal status, to better understand the unique position occupied by national flags. Flag 'waving' has become more prevalent in many liberal democracies. In such societies, flags occupy not a religious role, but a quiet and quotidian place in what Billig terms 'banal nationalism'. As a cipher for the whole, a particular flag's design is relatively unimportant; what lends it power is a mix of the gravity bestowed by its official designation and the easy commodification lent by a flag's easy reproducibility and portability. Unlike other state symbols such as the currency, coat of arms and honorifics, the state does not seek to monopolise the flag's use, let alone define its meaning. An analysis of the laws in several countries governing flag designation, observance and 'desecration' reveals that the law accords the flag distinct status yet only equivocal protection. While the state may crave its citizens' fealty, a flag is not a symbol of some distant governmentality. Rather, it is gifted to 'the people' and relies for its relevance on its organic proliferation. As both object and image, people attribute a power to the flag - a power they recognise over themselves and others with whom they share a body politic. A key source of this fetishisation is its official, legal designation. Though it embodies no particular values, a flag is valued, even fetishised, by flag-wavers and flag-burners alike.

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<sup>(1)</sup> Associate Professor, Law School, University of Queensland

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